In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-228

MURRAY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5285

LENDALE HEARN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there was insufficient evidence to sustain their convictions and that unlawfully seized evidence was used against them.

After a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted, together with L. J. Griffin, of conspiring to transport, receive and conceal stolen property moving in interstate commerce, in violation of 18 U.S.C. 2314, 2315 and 371; petitioner Taylor was also convicted of one,

and co-defendant Griffin of two substantive counts of receiving and concealing stolen property transported interstate, in violation of 18 U.S.C. 2315. Taylor was sentenced to concurrent terms of imprisonment of one year and one day and was fined $500 on each count; Hearn was sentenced to a term of three years' imprisonment with all but six months suspended in favor of probation.[1] The court of appeals reversed Taylor's conviction on the substantive count because of an unlawful search and seizure, but affirmed his and Hearn's conviction on the conspiracy count (Pet. App. B).[2]

1. The evidence showed that shortly after a Massey-Ferguson tractor, having a front-end loader and back hoe, was stolen from a construction company in Paris, Tennessee, petitioner Hearn delivered the tractor to Griffin at the latter's farm in the adjacent county in Tennessee (A. 48b-57b),[3] using the truck and trailer that had also been stolen from the construction company and which were subsequently found abandoned (Tr. 111-112). Hearn and Griffin were seen conversing for approximately one-half hour after the tractor was unloaded, but the subject of their conversation is unknown (A. 56b-57b). The tractor was thereafter seen on petitioner Taylor's farm, which is in the same county as Griffin's farm (A. 63b-67b); Taylor loaned it to a neighbor, and told a false story concerning the source from which he acquired it (A. 67b-69b). Taylor later stated that he had to move the tractor so that it

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[1] Griffin, who did not appeal, received concurrent sentences of three years' imprisonment on each count. A fourth defendant, Dewey Berryhill, was acquitted on the conspiracy charge.

[2] "Pet. App." refers to the appendix to Taylor's petition for a writ of certiorari (No. 74-228).

[3] "A." refers to the appendix in the court of appeals; "Tr." refers to the trial transcript.

could be delivered to someone else (A. 79b-80b). Two months after Griffin acquired the tractor he transported it to Marion, Arkansas, where he had it repaired and attempted to sell or lease it (A. 81b, 96b-98b, 105b; Tr. 313-317). One month later he brought it back to his farm in Tennessee (A. 83b, 98b-99b), where it was discovered by an agent of the Tennessee Bureau of Criminal Investigation (A. 132b).

a. Petitioner Taylor argues that the evidence was insufficient to sustain his conviction because the government could show only that the tractor he had on his farm was similar to the stolen tractor recovered from Griffin, not that it was "the same piece of equipment" (Taylor Pet. 32), and because government witnesses placed the tractor in Arkansas in October, the same time that he had a tractor on his farm, thus precluding the possibility that the two tractors were the same (Taylor Pet. 33). The evidence showed, however, that Griffin transported the tractor to Arkansas in December, not in October when a tractor was seen in Taylor's possession (A. 97b, 105b). Witnesses who saw the tractor both while it was in Taylor's possession and after it was recovered and returned to its owner testified that on both occasions they observed the same peculiarities in the equipment (A. 69b-82b, 96b-97b). From this testimony the jury could infer that the witnesses had seen the same piece of equipment on both occasions. Additional evidence of Taylor's guilt was provided by the false story he gave concerning its source, when lending the tractor to a neighbor, as well as by his false denials to state and federal agents that he had ever owned or possessed a tractor or lent one to a neighbor (A. 58b-59b, 150b-151b).

b. Petitioner Hearn, while conceding that the evidence was sufficient to establish that the tractor that he delivered to Griffin was stolen and that he was the thief and hence knew it was stolen, nevertheless argues that his mere knowing delivery of stolen equipment was insufficient to support a reasonable inference that a conspiratorial agreement existed (Hearn Pet. 15-16). The transfer of stolen property from one person who knows it is stolen to another who also has that knowledge is, however, sufficient to evidence an unlawful agreement between the two to receive such property. This is not a case like *United States* v. *Shiver*, 414 F. 2d 461 (C.A. 5), on which petitioner relies (Hearn Pet. 16), where the underlying theft was not established by competent evidence.

2. The tractor was seized from a shed on Griffin's farm by Tennessee Bureau of Criminal Investigation agents executing a search warrant that the court of appeals found to be defective (Pet. App. B 7). The court nevertheless properly held *(id.* at 8-9) that petitioners lacked standing to challenge the search and seizure because as in *Brown* v. *United States*, 411 U.S. 223, they (1) were not on the premises at the time of the search and seizure; (2) alleged no proprietary or possessory interest in the premises; and (3) were not charged with an offense that included, as an essential element, possession by them of the tractor at the time of the search and seizure. See *id.* at 229, 230, n. 4. There is no merit to petitioners' argument that *Brown* applies only where the person subjected to an unlawful search is tried separately from his co-defendants. The person subjected to search was tried separately in *Brown* because his pretrial motion to suppress was granted; a joint trial, at which the evidence was admitted only against his co-defendants, might have been prejudicial to him even if a limiting in-

struction were given. Here, the evidence was admissible against petitioners and only Griffin — who did not appeal — could have been prejudiced by its introduction at the joint trial.

Nor are petitioners aided by *McDonald* v. *United States*, 335 U.S. 451, 456, assuming *arguendo* that the rule of that case can be said to have survived *Brown* (cf. *Alderman* v. *United States*, 394 U.S. 165, 173, n. 7). In *McDonald* the seized evidence "would not have been available for use at the trial" if the motion to suppress had been granted, since it constituted personal property of the co-defendant and would have had to have been returned to him. 335 U.S. at 456. Here, the seized evidence, being stolen property, would have been returned to its owner rather than to Griffin if the motion to suppress had been granted, and hence would have been available for use at trial.

3. Taylor's conviction reversed by the court of appeals for violation of 18 U.S.C. 2315 was based upon his possession and concealment of a Caterpillar Traxcavator; unlike concealment of the tractor, concealment of the traxcavator was not charged as an overt act in the conspiracy count. Taylor nevertheless argues (Taylor Pet. 29-30) that the prejudice from the admission of evidence concerning the traxcavator tainted his conviction on the conspiracy count. The purpose of the suppression rule — *i.e.*, vindication of the prohibition against illegal searches and seizures — was, however, fully served by the court of appeals' reversal of Taylor's conviction on the only count on which evidence concerning the traxcavator was admitted. The trial court repeatedly and carefully instructed the jury that each count of the indictment was to be considered separately (A. 166b-167b, 168b, 173b, 174b, 175b).

Contrary to Taylor's assertion (Taylor Pet. 27-29), the government made no effort at trial to implicate Griffin and Hearn in the theft and transportation of the traxcavator. Rather, the government showed only that it was stolen and transported interstate by persons unknown, and was thereafter discovered concealed on Taylor's farm. Moreover, any prejudicial effect that evidence concerning the traxcavator may have had on the jury's consideration of the conspiracy count did not arise from the unlawful search for and seizure of the equipment, but rather from the fact that two counts charging separate and distinct transactions were tried together. Taylor's proper remedy, therefore, would have been a pretrial motion for severance—a motion that he failed to make.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.